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No. 09-21

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PAUL WARNER POWELL,
Petitioner,

v.

LORETTA K. KELLY,
WARDEN, SUSSEX I STATE PRISON,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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INTRODUCTION

The Warden's opposition distorts the record and attempts to hide the substantial reasons why the petition should be granted and Powell's execution stayed.

The Warden argues that Powell was not in jeopardy at his first trial for capital murder in the commission of a rape or attempted rape of Stacie Reed even though, at that trial, the prosecutor *opposed* dismissal of the capital murder charge by arguing that "we have evidence here . . . that . . . [Powell] was having sex or attempting to have sex with Stacie" and the circumstances of the killing included "evidence . . . of his intent to rape." Pet. App. 32a-33a. The Commonwealth cannot have it both ways: contending at trial that Powell could be convicted of capital murder in the commission of rape or attempted rape of *Stacie*, and contending now, after that theory of prosecution failed, that a bill of particulars prevented Powell from being placed in jeopardy for that very offense.

Nor can the Warden hide the fact that this case presents the precise question upon which this Court has granted certiorari in *Wood v. Allen*, No. 08-9156. The Warden contends that Powell's claims involve only "legal" and not "factual" issues, but that is demonstrably false. The Warden acknowledges that the state court's determination that Powell suffered no "prejudice" from the false NCIC report was based on "the totality of the evidence." Brief in Opposition ("Opp.") 16 n.6. Because the Fourth Circuit improperly relied on § 2254(e)(1) to evaluate claims based entirely on the state court record, at a

minimum this case should be held – and Powell's execution stayed – pending the Court's decision in *Wood*.[1]

I. VIRGINIA CANNOT NEGATE THE DOUBLE JEOPARDY PRINCIPLES OF *BULLINGTON* AND *RUMSEY* BY CLASSIFYING A PREREQUISITE FOR DEATH AS AN "ELEMENT" OF CAPITAL MURDER.

The Warden seeks to avoid the implications of this Court's holdings in *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Arizona v. Rumsey*, 467 U.S. 203 (1984), based on a semantic distinction: Virginia chooses to classify certain prerequisites for the imposition of death as an *element* (or "gradation offense," Opp. 6 n.1) of capital murder, rather than a penalty phase "aggravator." That distinction does not have constitutional significance, and this issue has been preserved.

1. Tellingly, the Warden first contends that "Powell never presented this argument in the court below," Opp. 17, not that Powell never presented this *claim*. From the moment the Commonwealth reindicted him for capital murder following his initial appeal, Powell has claimed that the Double Jeopardy Clause prevented Virginia from again seeking death. His previous "acquittal of death" – in that the Virginia Supreme Court found that the prosecution had failed to establish *any* qualifying

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[1] The Warden suggests that Powell's "own expert[ ] evaluation" of him was negative. Opp. 1. In fact, the Commonwealth previously has noted the extensive mitigating aspects of that evaluation. JA 906.

prerequisite for the imposition of death – was the foundation for Powell's claim. Indeed, in her argument concerning the bill of particulars, which the Warden concedes Powell *did* raise, Opp. 20, the Warden contends that "Powell goes astray when he speaks of the Virginia statutory framework as 'multiple theories' of capital murder," when instead "each gradation offense committed against a separate victim is a separate capital murder offense." Opp. 24. But that is precisely Powell's point: Virginia *cannot* avoid the double jeopardy principles of *Bullington* and *Rumsey* simply by converting sentencing aggravating factors into substantive "gradation offenses." Pet. 21.

In any event, this Court has made clear that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

2. As Powell has argued, this case is indistinguishable from *Rumsey*. Pet. 18-20. Like Powell, the petitioner in *Rumsey* conceded (through counsel) the presence of a death-qualifying circumstance after his first acquittal. 467 U.S. at 208. This Court nevertheless held that Rumsey could not be subjected to death again for the same crime. Other courts have recognized that the fact that the State charged the *wrong* aggravating factor, or later asserted a *new* aggravating factor, cannot overcome an initial failure to prove any adequate basis for the imposition of death. *Young v. Kemp*, 760 F.2d 1097, 1103-07 (11th Cir. 1985) (regardless of whether the defendant's acquittal of death was

correct, or Georgia could prove a new aggravating factor, defendant could not be put in jeopardy of death again once a court determined that the prosecution's evidence in support of the death penalty was insufficient); *Brown v. State*, 521 So. 2d 110, 112 (Fla. 1988); *State v. Caudill*, 706 P.2d 456, 463 (Idaho 1985); *State v. Lomax*, 774 N.E.2d 249, 254-55 (Ohio 2002) (Cook, J., concurring).

3. To evade these principles, the Warden draws a false distinction between rape as a prerequisite *element* of "capital murder" and the same conduct as a sentencing-phase aggravating factor. Opp. 18-20.[2] Yet such a distinction has been rejected by this Court. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative" on the question of whether a defendant has the right to a jury determination. *Id.* at 605-06 (internal quotation marks omitted). The Warden states that Powell "misunderstands what was at issue in *Ring*," Opp. 19, but then makes no effort to explain why a semantic distinction that was held not to control the application of one fundamental procedural right should be dispositive in the case of another. In other cases, this Court has recognized that the basic purpose of death eligibility factors, and the reason they are constitutionally mandated, is to perform a "narrowing" function to

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[2] The Warden is simply wrong in contending that for a defendant to be acquitted of death, a life sentence must be imposed. Opp. 19. This Court has never held that such a sentence must actually be imposed in order for jeopardy to attach.

"limit the class of murderers to which the death penalty may be applied .... *at either the guilt or penalty phase.*" *Brown v. Sanders*, 546 U.S. 212, 216 (2006) (emphasis added); *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988). In none of these cases was the "narrowing" factor's label as an "element" or "sentencing aggravator," or its presence at the guilt or penalty phase, deemed to have any constitutional significance.

The semantic distinction the Warden advocates would convert the adjudication of capital murder into "a set of minitrials on the existence of each aggravating circumstance," precisely what this Court rejected in *Poland v. Arizona*. 476 U.S. 147, 156 (1986). It also would undermine the goal of finality this Court repeatedly has preserved in applying double jeopardy principles to capital sentencing. Finality would become virtually unattainable if prosecutors were able to pursue repeated attempts to obtain death simply by identifying new and distinct "offenses" of capital murder, as the Commonwealth did here.

II. A State Cannot Use A Bill Of Particulars To Define The Scope Of Jeopardy In A Manner Inconsistent With The Double Jeopardy Clause.

The Warden's contention that Powell's bill of particulars argument presents no federal question is patently incorrect. The determinations of the courts below that Powell's re-indictment for capital murder did not violate double jeopardy rests on those courts'

conclusion that the bill of particulars narrowed the scope of jeopardy otherwise defined by Powell's initial amended indictment. But a State cannot define the scope of jeopardy in a manner inconsistent with the federal constitutional guarantee that an individual may not be placed twice in jeopardy for the same offense. The question before the state court was whether a bill of particulars can, consistent with federal double jeopardy law, narrow the jeopardy defined by a broader indictment. Under double jeopardy principles clearly established by this Court, the only reasonable answer to that question was no.

As discussed in the petition, this Court has made clear that jeopardy is defined by the *indictment* and the charged *offense* (or offenses), not by the *facts* alleged (in a bill of particulars or otherwise) or proved at trial. Pet. 23-27. Although states are free to employ bills of particulars, state practices still must conform to federal double jeopardy law. This Court has never recognized an exception to the rule that jeopardy is defined by the *indictment* and the charged *offense* that would allow a bill of particulars or other pretrial disclosure to narrow the scope of jeopardy.[3] As a matter of federal constitutional law, the jeopardy that, once imposed, precludes a second prosecution for the same offense is defined by the *offense* charged in the indictment, not by factual allegations or proof.

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[3] As the Virginia Supreme Court acknowledged, even under Virginia law "the bill of particulars is not for the purpose of charging the offense" and "[t]he indictment must do that." Pet. App. 194a-195a (quotation marks omitted).

Moreover, *even if* there could be a situation where a bill of particulars could be used to narrow the scope of jeopardy from a more broadly written indictment, there must be safeguards to ensure that the federal double jeopardy guarantee is protected. In particular, if ever there were a case where a bill of particulars, rather than a charging document, could define the scope of jeopardy for purposes of the Double Jeopardy Clause, this Court's decisions suggest at a minimum that (a) the theory of prosecution at trial must conform to the narrower scope of jeopardy purportedly defined by the bill of particulars, (b) the narrower scope of jeopardy must be consistent with the definition of the offense provided to the jury, and (c) the prosecution must bear the burden of proving that, despite the broader charging document, jeopardy for purposes of the federal constitutional guarantee was clearly and consistently narrowed by events before and during trial.

The instant case utterly fails any such inquiry. Most egregiously, the prosecution disregarded the bill of particulars and invoked the broader indictment to gain a litigation advantage when Powell moved at trial to dismiss the capital murder charge. Pet. App. 32a-33a. As the Warden admits, not only did the original amended indictment fail to limit jeopardy to capital murder in the commission of a rape of Kristie, but "the Commonwealth mis-worded its amended indictment to include the language 'during' the commission of rape, instead of 'in' the commission of rape." Opp. 9. As a result, the *indictment* on which Powell was tried was "restricted to crimes of murder occurring during or after the

rape." *Id.* Moreover, the Warden concedes that "it was uncontested that Powell murdered Stacie before he raped Kristie" and, therefore, "the murder could not have occurred 'during' the commission of rape." *Id.* Thus, the Warden now concedes that Powell's motion for directed verdict should have been granted, *and no prerequisite for death would have been proved at Powell's first trial.* But at trial, the Commonwealth mightily resisted that result (and indeed, now, the Warden *relies* on the fact that "Powell never was 'acquitted of death'" at that trial, Opp. 18). And the Commonwealth resisted that result the only way it could: by arguing there was evidence of murder in the commission of a rape or attempted rape of *Stacie*, which the charging document was broad enough to encompass. This tactic was compounded by other prosecution conduct at trial. *See* Pet. 5-6. The Warden cannot be permitted now to claim that jeopardy was defined by the narrower offense specified in the bill of particulars when Virginia so blatantly ignored that limitation throughout the trial. It is telling that, in its second opinion, the Virginia Supreme Court dismissed the significance of Powell's indictment as the product of "a drafting error." Pet. App. 196a.

As Judge Gregory noted, the Commonwealth "did not fail to prosecute Powell for the attempted rape of Stacey, it just failed to do so successfully." Pet. App. 33a n.1. The double jeopardy issue here is important and worthy of this Court's review.

III. THE ISSUE IN *WOOD* IS SQUARELY PRESENTED.

The Warden's contention that Powell's case does not present the issue in *Wood v. Allen*, No. 08-9156, is untenable.

1. Powell asserts that the state court made unreasonable determinations of the facts concerning the errors in the NCIC report and assumptions the jury may have made regarding those errors. The report contains *two* false *convictions* for capital murder and a *third* entry for capital murder "disposition not received." Pet. App. 160a, 161a. A lawyer familiar with this case cannot recognize these errors by looking at the document, *see* Pet. App. 158a-162a, much less a lay jury. The document also contains ten other entries Powell has shown should not have been presented to the jury because they were prejudicial (dismissed and nolle prossed charges). JA 15 nn.7-9.

For the first time, the Warden describes the capital murder conviction at the top of page 3, Pet. App. 160a, as "accurate[ ]." Opp. 12. This is absurd – at the time of Powell's retrial he had *no* convictions for capital murder, and a conviction that is reversed is patently no longer a conviction. And the Warden, like the state court, makes a vital mistake in speculating that the jurors must have deduced this entry was for Powell's overturned capital murder conviction. The Warden and the state court have ignored the entry for capital murder at the bottom of page four, App. 161a, "disposition not received." If the jury were to speculate that *any* entry on the report were to relate to the killing of Stacie, it would

be this entry, not the two capital murder *convictions* also claimed on the report.

The Warden, like the state court, also wrongly states that "little to no use" was made of the report at trial. Opp. 30. To the contrary, the NCIC report was the only *evidence* of Powell's criminal history. The jury was instructed to consider Powell's criminal history, JA 298, and it certified it had done so on the verdict form. Although the Warden and courts below place great weight on the fact that the prosecutor, in a statement to the court in the presence of the jury, accurately listed Powell's prior crimes, Opp. 30, the jury was instructed that statements of counsel are not evidence, and this Court has emphasized that a jury is presumed to follow such instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The Warden also has no explanation for what the jurors must have thought about the second capital murder conviction on the bottom of page 3, Pet. App. 160a. The opposition resorts to a meaningless explanation for how the NCIC report may have contained such an error, Opp. 13 n.5, but the jury had none of that information.

Thus, the state court unreasonably found that the NCIC report contained only *one* false conviction for capital murder and then unreasonably speculated that the jury must have known that Powell had *no* prior convictions for capital murder. App. 166a. Powell always has emphasized that the issue is *not*, as the Warden contends, whether the jury still would have found the aggravating factors of future dangerousness and vileness. JA 799; *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (explaining difference between eligibility for death and selection

of death over life in Virginia scheme). The issue is whether, despite these aggravators, the jury would have imposed death, particularly given that Virginia does not require the jury to "weigh" the aggravating factors against the mitigation evidence. Pet. App. 164a-165a. Clearly, a correct assessment of the false prior convictions in the NCIC report is necessary to determine whether confidence in the jury's selection of death over life without parole was undermined by those errors.

2. The Warden's insistence that the state court's rejection of Powell's ineffectiveness claim was based on an evaluation of *prejudice* further highlights the factual nature of this claim. Opp. 30-31. The issue of prejudice inherently includes factual determinations and an assessment of the record. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). The Warden admits as much, arguing that the Virginia Supreme Court "found that the dissenting opinion failed to take into consideration the totality of the evidence to be weighed in determining the issue of prejudice." Opp. 16 n.6. Thus, Powell's ineffectiveness claim indisputably challenges the state court's determination of the facts in light of the state court record, to which the Fourth Circuit improperly deferred.

3. Finally, the state court's rejection of Powell's double jeopardy claim also was based on factual determinations. As Powell has shown, Pet. 33-34, his double jeopardy claim was rejected based on a factual determination of what occurred at his first trial. As Judge Gregory concluded, "[i]n finding that the attempted rape of Stacey had not been litigated in the first trial, the Supreme Court of Virginia made

an unreasonable determination of the facts in light of the conduct of all parties involved in that trial." Pet. App. 40a.

Thus, with regard to both the NCIC report and double jeopardy claims, Powell challenges the state court's factual determinations based on the contents of the state court record. His claims therefore arise under § 2254(d)(2). Yet the Fourth Circuit applied § 2254(e)(1) to these claims, consistent with its earlier decision in *Lenz v. Washington*, 444 F.3d 295, 300-01 (4th Cir. 2006). Pet. 31-33. The Warden in fact acknowledges the Fourth Circuit's application of § 2254(e)(1). Opp. 31. What the Warden fails to grasp is that this is precisely the reason this case raises the same question as in *Wood*. Like *Wood*, Powell's case raises the question whether the § 2254(e)(1) standard applies to federal habeas challenges based solely on the contents of the state court record. Thus, at a minimum, this Court should hold Powell's petition pending its resolution of *Wood*.

CONCLUSION

The petition should be granted and Powell's execution stayed.

Respectfully submitted,

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